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et's All Go to the Dairy Queen Without Margo!: The Liability of Franchisors Under Title III of the Americans with Disabilities Act After Neff v. American Dairy Queen Corp

Kathleen Pearson

COMMENTS

Let's All Go To The Dairy Queen Without Margo!: The Liability of Franchisors Under Title III of the Americans with Disabilities Act After *Neff v. American Dairy Queen Corp.*

I. Introduction

The Americans with Disabilities Act (ADA or the Act)[1] was intended to make the advantages of mainstream life available to the estimated forty-three million Americans who suffer from discrimination because of their disabilities.[2] When President George Bush signed the ADA into law on July 26, 1990, he hailed it as the "world's first comprehensive declaration of equality for people with disabilities."[3]

As a disabled person who uses a wheelchair to gain mobility,[4] Margo Neff is presumably one of the forty-three million that the ADA was intended to help. When architectural barriers denied

1. 42 U.S.C. §§ 12101-12213 (Supp. II 1990).
2. 42 U.S.C. § 12101(b) (Supp. II 1990).
3. Remarks on Signing the Americans with Disabilities Act of 1990, 1990 PUB. PAPERS 1067, 1068 (July 26, 1990).
4. Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1064 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

Ms. Neff access to her local Dairy Queen restaurant, she filed suit against the franchisor, American Dairy Queen Corporation (ADQ).[5] She alleged that the franchisor was in violation of the section of the ADA which requires that private entities provide access to public accommodations to persons with disabilities (Title III).[6] She further alleged that the franchisor was liable for the modifications necessary to allow her access.[7] The Fifth Circuit Court of Appeals disagreed, affirming the district court's granting of ADQ's summary judgment motion.[8]

Neff was a test case on the liability of franchisors under Title III.[9] As such, the decision will necessarily have a profound impact on the ability of persons with disabilities to obtain Title III compliance from franchised businesses. This Comment will examine the basis used by the Fifth Circuit to determine the liability of ADQ, other bases of franchisor liability which originated in both the common law and other federal statutory schemes, the repercussions of adopting various bases in analyzing the Title III liability of franchisors, and ultimately the possibility of adopting an analysis of franchisor liability unique to Title III. But, first, it is necessary to briefly set forth the history of the ADA and the background of franchising in the United States.

II. The History and Purpose of the ADA

The ADA was not the first federal legislation enacted for the benefit of persons with disabilities; the Architectural Barriers Act of 1968[10] provided for persons with disabilities to gain access to buildings designed, constructed, or altered using federal funds;[11] in addition, § 504 of the Rehabilitation Act of 1973[12] prohibited discrimination against persons with disabilities by any program or activity receiving federal funds.[13] However, since these acts covered only entities receiving federal funding, the relief they provided was limited.

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5. *Id.* (citing to 42 U.S.C. § 12188(a) (1988) (providing for remedy of injunctive relief)).
6. *Id.* at 1064 (citing 42 U.S.C. § 12182 (Supp. II 1990)).
7. *Id.*
8. *Id.*
9. *See* Jerry Laws, *Franchisors Win ADA Test Case*, TEX. LAW., Aug. 7, 1995, at 4 (providing a background on the *Neff* case).
10. 42 U.S.C. §§ 4151-4157 (1988).
11. *Id.*
12. 29 U.S.C. § 794 (1988).
13. 29 U.S.C. § 794(a) (1988).

In spite of this earlier legislation, Congress made the following findings when it considered passage of the ADA and included them in the Act: forty-three million Americans have a physical disability and this number is increasing as the population as a whole grows older;[14] discrimination against persons with disabilities is a serious and pervasive social problem;[15] persons with disabilities have been without legal recourse to address the discrimination;[16] and this discrimination has designated persons with disabilities an isolated group, disadvantaged socially, vocationally, economically and educationally.[17] The purpose of the ADA, also set forth in the Act, is to mandate the elimination of discrimination against persons with disabilities,[18] to provide clear, strong, consistent and enforceable standards against such discrimination,[19] and to provide for federal enforcement of such standards.[20] While Titles I and II of the Act deal with a protected individual's right to employment[21] and to public services and transportation,[22] Title III deals with rights to public accommodations and services operated by private entities.[23]

The general rule of Title III provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any

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14. 42 U.S.C. § 12101(a)(1) (Supp. II 1990).
15. 42 U.S.C. § 12101(a)(2) (Supp. II 1990).
16. 42 U.S.C. § 12101(a)(4) (Supp. II 1990).
17. 42 U.S.C. § 12101(a)(6) (Supp. II 1990).
18. 42 U.S.C. § 12101(b)(1) (Supp. II 1990).
19. 42 U.S.C. § 12101(b)(2) (Supp. II 1990).
20. 42 U.S.C. § 12101(b)(3), (4) (Supp. II 1990). The ADA charges the U.S. Attorney General with promulgation of regulations to implement the non-transportation provisions of Title III. 42 U.S.C. § 12186(b) (Supp. II 1990). Under mandate, the Department of Justice has issued regulations, 28 C.F.R. §§ 36.101-.608 (1994), and a technical assistance manual, DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES (1993), issued under 42 U.S.C. § 12206(c)(3) (Supp. II 1990). The Civil Rights Division of the Department of Justice undertakes enforcement of ADA Title III. Telephone Interview with Roberta Roque, U.S. Department of Justice, Civil Rights Division (Oct. 24, 1995). Regulations issued by the Department of Justice under Title II (Public Services) are entitled to substantial deference. Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir.) (citing Blum v. Bacon, 457 U.S. 132, 141 (1982)), *cert. denied sub nom.* Pennsylvania Secretary of Pub. Welfare v. Idell S., 116 S. Ct. 64 (1995). Presumably, the Justice Department's regulations under Title III would be entitled to the same deference.
21. 42 U.S.C. §§ 12111-12117 (Supp. II 1990).
22. 42 U.S.C. §§ 12131-12165 (Supp. II 1990).
23. 42 U.S.C. §§ 12181-12189 (Supp. II 1990).

person who *owns, leases (or leases to), or operates* a place of public accommodation."[24]

"Public accommodations" are defined in twelve categories and include, briefly, privately owned hotels, restaurants, movie theaters, retail sales stores, schools and, generally, any places providing consumer goods and services.[25] "Discrimination" is defined, in part, as the failure to make reasonable modifications in policies or procedures to allow persons with disabilities to receive goods or services (unless the modification would fundamentally alter the nature of the goods or services or would be an undue burden) and the failure to remove architectural or communications barriers where readily achievable.[26] "Readily achievable" is defined as easily accomplished without much difficulty or expense.[27] The overall financial resources of the covered entity are to be considered in evaluating the level of expense.[28] The inclusion or exclusion of franchisors from the analysis of whether or not a proposed modification in a franchised business is readily achievable becomes important when a franchisee's assets are low.[29]

III. The Origin, Development and Success of Franchising in the United States

The concept of franchising originated in the post-World War II period as a competitive response by local and national entrepreneurs to the chain store phenomenon.[30] The federal trademark statute, the Lanham Act,[31] established the basis of franchising by

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24. 42 U.S.C. § 12182(a) (Supp. II 1990) (emphasis added).

25. 42 U.S.C. § 12181(7) (Supp. II 1990).

26. 42 U.S.C. § 12182(b)(2)(A) (Supp. II 1990). For a discussion of the undue burden provision in Title I, see Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans With Disabilities Act*, 48 VAND. L. REV. 391 (1995).

27. 42 U.S.C. § 12181(9) (Supp. II 1990).

28. *Id.*

29. Telephone Interview with Robert Farr, of Heffernan, Farr, McChord & Morelli (Oct. 27, 1995).

30. Erwin S. Barbre, Annotation, *Validity, Construction, and Effect of State Franchising Statute*, 67 A.L.R.3d 1299, 1302 (1975).

31. 15 U.S.C. §§ 1051-1127 (1994) (also known as the Trademark Act of 1946). A trademark is a word or design used on goods or in connection with services which is used to designate one source of goods from others in the marketplace. JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW 27 (1991). The Lanham Act provides for federal registration of trademarks, 15 U.S.C. § 1051 (1994), and provides relief to owners whose registered marks are infringed, used without permission, by another party. 15 U.S.C. § 1114 (1994).

permitting trademark owners to license independent parties to use their marks and continues to be in effect today.[32] Owners do not lose rights in their marks, so long as they adequately control the trademark use.[33] With minimum capital and manpower, a local entrepreneur can establish a business with nationwide name recognition.[34] Over the half century since passage of the Lanham Act, the concept of franchising has grown increasingly more complex and now typically also embraces mandating a business format to be used in conjunction with the marks.[35] Franchised businesses achieve success by creating among the public a perception of quality and uniformity in all of the franchise outlets.[36] The business format, usually detailed in an operating manual, helps franchisees achieve the requisite levels of quality and uniformity.[37]

According to the International Franchise Association (IFA), a private organization of franchisors and franchisees with over 27,000 members worldwide, 1992 U.S. sales from franchising amounted to $803.2 billion and accounted for 40.9% of retail sales.[38] IFA speculates that sales in the year 2000 could reach $1 trillion.[39] Franchised businesses employ over 8 million people and account for one out of every twelve businesses in the U.S.[40]

Business format franchises, as opposed to franchises marketing the franchisor's product, account for nearly three quarters of the total number of franchised businesses.[41] Among the business categories in which business format franchises concentrate are restaurants, hotels, business services, automotive services, automotive rental services, convenience stores, construction and home improvement, recreation and educational services and cleaning

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32. 15 U.S.C. § 1055 (1994); *see generally* Turner v. H M H Publishing Co., 380 F.2d 224 (5th Cir.), *cert. denied*, 389 U.S. 1006 (1967).

33. 15 U.S.C. § 1055. Courts routinely impose a duty on licensors to oversee trademark use by licensees. Kentucky Fried Chicken v. Diversified Packaging, 549 F.2d 368, 387 (5th Cir. 1977). Absence of control leads to abandonment of rights. 15 U.S.C. § 1055; *see* Oberlin v. Marlin American Corp., 596 F.2d 1322, 1326-27 (7th Cir. 1979).

34. Barbre, *supra* note 30, at 1302.

35. *See, e.g.*, H & R Block, Inc. v. Lovelace, 493 P.2d 205, 211-12 (Kan. 1972).

36. *See* David J. Kaufmann, *Vicarious Liability Topples Domino's*, N.Y. L.J., Feb. 25, 1994, at 3.

37. *Id.*

38. INTERNATIONAL FRANCHISE ASSOCIATION, FRANCHISE FACT SHEET (1995).

39. *Id.*

40. *Id.*

41. *Id.*

services.[42] Such businesses are precisely those that are covered by the public accommodation provisions of the ADA.[43]

IV. The Decision of the Fifth Circuit Court of Appeals in *Neff v. American Dairy Queen Corp.*[44]

The Fifth Circuit acknowledged that the question of franchisor liability for accommodations under Title III of the ADA was one of first impression.[45] The plaintiff, Ms. Neff, argued that the lower court's grant of ADQ's summary judgment motion was erroneous, because the franchise agreement provided for ADQ's exercise of pervasive control over the franchisee.[46] Neff attempted to persuade the court that such pervasive control should render the franchisor and the franchisee co-operators, who should each be jointly liable for the architectural modification of the premises.[47] The theory of joint liability finds support in both the statute and in regulations which allow landlords and tenants to be jointly liable for any premises leased to a public accommodation.[48]

The Department of Justice (DOJ), appearing as amicus curiae, supported the theory of franchise liability, arguing that the status of "operator" under the ADA is a question of fact.[49] Therefore, the district court's ruling should have been reversed and the case remanded for discovery on the issue of the control retained by ADQ over the franchisee.[50] The DOJ brief noted the Department's position that any allocation of responsibility between the franchisor and franchisee was enforceable only between the parties.[51] So far as the law was concerned, if ADQ was found to be an operator, it and the franchisee were jointly and severally liable.[52]

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42. *Id.*
43. 42 U.S.C. § 12181(7).
44. 58 F.3d 1063 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).
45. *Neff*, 58 F.3d at 1066.
46. Appellant's Brief at 8 and 9, *Neff* (No. 94-50552).
47. *Id.* at 5.
48. 42 U.S.C. § 12182(a); 28 C.F.R. § 35.104 (1994).
49. Brief for the United States as Amicus Curiae at 9, *Neff* (No. 94-50552).
50. *Id.*
51. *Id.* at 16 (citing in support 28 C.F.R. § 36.201(b) (1994), which recognizes the allocation of responsibility for ADA compliance between a landlord and tenant, and the DOJ's *The Americans with Disabilities Act Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* (Nov. 1993), which explains that allocation is effective between the parties, but both remain fully liable).
52. *Id.*

ADQ objected to the application of vicarious liability theory to ADA statutory liability,[53] but nevertheless argued that its control over the franchisee was insufficient to find liability under such theory.[54] ADQ further argued that the common usage of the word "operate" does not encompass the concept of franchising.[55]

The International Franchise Association (IFA)[56] appeared as amicus curiae on behalf of ADQ. The IFA echoed ADQ's arguments and added that holding franchisors liable for ADA compliance would create a disincentive on the part of franchisees to comply with the Act.[57] Further, the IFA argued, a holding of franchisor liability under the ADA could have repercussions in other statutes and areas of common law liability that could threaten the survival of the franchising industry.[58]

The *Neff* court affirmed the summary judgment grant for ADQ.[59] It rejected the theory that controls over aspects of the franchisee's business other than designated architectural specifications could make ADQ an operator for purposes of liability to Ms. Neff under Title III.[60] The court held that, in order for liability to attach to the franchisor for Ms. Neff's claim, ADQ must have specific control over the demanded modification.[61]

Counsel for Ms. Neff filed a petition for writ of certiorari for review of the Fifth Circuit decision with the United States Supreme Court on October 18, 1995.[62] The Court denied certiorari on January 8, 1996.[63]

The presence or absence of a provision on architectural modifications in the franchising contract appears to be an easy test

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53. Appellee's Brief at 24, *Neff* (No. 94-50552).
54. *Id.* at 25.
55. *Id.* at 14.
56. *See generally* Section III.
57. Brief of the IFA as Amicus Curiae at 14, *Neff* (No. 94-50552).
58. *Id.* at 18.
59. *Neff*, 58 F.3d at 1070.
60. *Id.* at 1067.
61. *Id.* at 1066.
62. Telephone Interview with Pamela Breed Bonavita, Advocacy, Incorporated, counsel for the petitioner Ms. Neff (Oct. 24, 1995).
63. Neff v. American Dairy Queen Corp., 116 S. Ct. 704 (1996). The denial of certiorari was anticipated by counsel for ADQ, who stated shortly after the filing of the writ petition that, even if the Supreme Court was amenable to the issue, the brevity of the record made *Neff* a poor candidate for the grant of certiorari. Telephone Interview with Joseph M. Harrison, of Haynes & Boone, counsel for the respondent American Dairy Queen Corp. (Oct. 31, 1995).

of franchisor liability to apply, but is it a fair test? In order to answer this question, the following two sections survey the bases of franchisor liability for franchises under the common law and under federal remedial legislation other than the ADA.

V. Vicarious Liability of Franchisors under the Common Law[64]

According to the franchising industry, the basis underlying the franchising arrangement is the theory that the franchisor and franchisee are independent entities, bound only by a contractual arrangement.[65] Franchisors, therefore, should incur no liability to third parties for any acts of their franchisees.[66]

Although receptive to the franchising theory, courts have not established concrete definitions of franchisor and franchisee[67] and have, accordingly, refused to adopt per se rules rejecting franchisor liability to third parties for acts of the franchisee.[68] Instead, in liability cases, courts typically analyze the true relationship between the franchisor and franchisee.[69] As the following discussion shows,

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64. For an article focusing on this topic, see Herbert B. Chermside, Jr., Annotation, *Vicarious Liability of Private Franchisor*, 81 A.L.R.3d 764 (1977).

65. Kaufmann, *supra* note 35, at 3.

66. *Id.*

67. The New Jersey court in Neptune T.V. & Appliance Service, Inc. v. Litton Microwave Cooking Products Division, Litton Systems, Inc., 462 A.2d 595, 598 (N.J. Super. Ct. App. Div. 1983) set forth the "two definitional criteria of a franchise . . . [as] a grant by the alleged franchisor to the alleged franchisee of a license permitting [franchisee] to use the franchisor's trade name . . . [and] the sharing by both parties of a community of interest in a business enterprise." The court further provided that, although "the franchise relationship is akin to a partnership . . . [t]hey are . . . not partners in the true sense of sharing profits and losses." *Id.* at 600.

Whereas, the New York court in Matarazzo v. Friendly Ice Cream Corp., 70 F.R.D. 556, 559 (E.D.N.Y. 1976) wrote, "a franchisee . . . must perform according to the judgment, rules, regulations, methods and guidelines of the franchisor. [Whereas], [t]he customary independent contractor exercises his independent judgment and performs his contract according to his own method and is not subject to the control of the other party to the contract."

68. *See* Stanford v. Dairy Queen Products, 623 S.W.2d 797, 803 (Tex. App. 1981) (holding that there is no intrinsic reason why the relationship of "agency" or "representative" could not arise in the franchise context); *see also* Singleton v. International Dairy Queen, Inc., 332 A.2d 160, 163 (Del. Super. 1975) (holding that the label which the parties to the franchise agreement give their relationship is not controlling in determining the franchisor's liability); McLaughlin v. Chicken Delight, Inc., 321 A.2d 456, 460 (Conn. 1973) (holding that a franchise contract may help determine whether a franchisee is an agent as a matter of fact, but is not determinative).

69. *See, e.g.*, Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781, 786 (3d Cir. 1978) and Evans v. S.S. Kresge Co., 394 F. Supp. 817 (W.D. Pa. 1975), *aff'd*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

the common law concepts of agency and ostensible agency have been used to establish franchisor liability where the relationship is found to be more than contractual.

"Agency" is a mutually beneficial agreement between two parties where one, the agent, consents to act for the benefit and under the control of another, the principal, who, in turn, consents to the agent's acting on behalf of the principal.[70] The franchisor's normal policing of the franchisee's trademark use is insufficient to create a principal-agent relationship.[71] Likewise, quality control over the goods or services marketed under the trademark is typically safe[72] and the receipt of royalty payments for trademark use will not make the franchisor vulnerable to principal status.[73]

An agency relationship requires that the principal have the right to control the work of the agent.[74] Therefore, if a franchisor's control reaches the point where it may fairly be described as pervasive, excessive or equivalent to day-to-day control, a principal-agent relationship may be found by the court.[75] Establishment of such a relationship is normally a matter of fact, rather than a question of law.[76] However, it is also possible that the terms of a franchise agreement are so strict that the agency relationship is

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70. *McLaughlin*, 321 A.2d at 459.

71. Oberlin v. Marlin American Corp., 596 F.2d 1322, 1327 (7th Cir. 1979).

72. Cislaw v. Southland Corp., 6 Cal. Rptr. 2d 386, 391 (Cal. Ct. App. 1992).

73. McGuire v. Radisson Hotels International, Inc., 435 S.E.2d 51, 52 (Ga. Ct. App. 1993); Whitco Produce Co., Inc. v. Bonanza International, Inc., 267 S.E.2d 627 (Ga. Ct. App. 1980); *see also Cislaw*, 6 Cal. Rptr. 2d at 395 (holding that the receipt of franchise fees did not render the franchise relationship a partnership or a joint venture).

74. Myszkowski v. Penn Stroud Hotel, Inc., 634 A.2d 622, 626 (Pa. Super. Ct. 1993); Little v. Howard Johnson Co., 455 N.W.2d 390, 393 (Mich. Ct. App. 1990); *McLaughlin*, 321 A.2d at 459.

75. *See Myszkowski*, 634 A.2d at 626 (holding franchisee's use of the franchisor's tradename and franchisee's participation in the franchisor's reservation network did not constitute control of day-to-day operations); *Little*, 455 N.W.2d at 393 (holding franchisor's rights to set standards for products and services, to regulate furnishings and advertising and to inspect for compliance with the agreement is not control of day-to-day operations). *But see* Exxon Corp. v. Tidwell, 867 S.W.2d 19, 23 (Tex. 1993) (holding that the relevant inquiry concerning the franchisor's liability for a service station attendant's injury during a robbery did not constitute general control by the franchisor of day-to-day operations, but rather its specific control over the service station's security).

The same control analysis typically appears in actions to pierce a corporate veil. *See, e.g.*, Geyer v. Ingersoll Publications Co., 621 A.2d 784, 793 (Del. Ch. 1992)("[A] court can pierce the corporate veil of an entity where there is fraud[,] or where a subsidiary is in fact a mere instrumentality or alter ego of its owner.").

76. *McLaughlin*, 321 A.2d at 459.

created on the basis of the agreement alone.[77] In applying the control test, some courts have recently focused on the operating manual that franchisors routinely provide to franchisees as evidence of control.[78]

The operating manual is typically comprehensive, covering virtually all important aspects of the franchisee's business operations.[79] While some courts may view such detailed operating provisions as the permissible quality control necessary to protect the quality and uniformity of the business,[80] in recent years others have used the manual as evidence of control giving rise to vicarious liability.[81]

Franchisor liability may also arise if the franchisee is operating as the franchisor's apparent agent. Even if the actual control is not present, a customer's reasonable reliance on the apparent authority of a franchisee may be sufficient to hold the franchisor liable.[82] However, the customer must have reasonably expected that the franchisor was responsible for the operation of the restaurant, not just that the franchisor would be liable for injuries.[83]

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77. *See* Murphy v. Holiday Inns, Inc., 219 S.E.2d 874, 877 (Va. 1975).

78. *See, e.g.*, Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322 (Fla. Dist. Ct. App.), *cause dismissed*, 589 So. 2d 291 (Fla. 1991), *overruled on other grounds by* Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995).

79. Kaufmann, *supra* note 36. Among the subjects normally covered are the following: site selection, construction and "build out" requirements, the hiring and firing of the franchisee's personnel, the systems of operation, procedures, standards, and techniques which the franchisee must adhere to, recipes, product preparation procedures and requirements, sources of supply, standards of maintenance and appearance, advertising and public relations activities and materials, record-keeping systems and materials, hours of operation, purchasing procedures, staffing requirements, required and prohibited uses of the franchisor's name and marks, insurance requirements, applicable licensing requirements, and required attire.

Id.

80. *See, e.g.*, Mann v. Prudential Real Estate Affiliates, Inc., Bus. Franchise Guide (CCH) ¶ 9732 (N.D. Ill. 1990); *see also* McGuire v. Radisson Hotels International, Inc., 435 S.E.2d 51, 52 (Ga. Ct. App. 1993).

81. *See Shelburne*, 576 So.2d at 332-33. Curiously, the failure to provide an operating manual has been found also to give rise to liability without the court perceiving a need to characterize it as direct liability for negligence or vicarious liability for the franchisee's negligence. *See* O'Boyle v. Avis Rent-A-Car System, Inc., 435 N.Y.S.2d 296 (N.Y. App. Div. 1981).

82. *See* Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988) (franchisee's notice of status on a restaurant sign did not preclude a jury's finding the appearance of ownership by the franchisor); *see also* Singleton v. International Dairy Queen, Inc., 332 A.2d 160, 163 (Del. Super. Ct. 1975).

83. Opinions in the following cases recognize the possibility of liability from ostensible agency, but deny that the evidence in each case was sufficient to hold the franchisor liable:

Franchisors may obligate themselves by an affirmative agreement to assume responsibility.[84] When a franchisor imposes an operating method on franchisees, the policy may also give rise to liability if the policy is seen to be responsible for the injury.[85] Three years ago the United States Court of Appeals for the Eighth Circuit held that Domino's Pizza, Inc., the franchisor, was liable for a violation of civil rights laws for its no-beard policy which had a disparate impact on African Americans.[86]

Domino's Pizza, Inc. has also been forced to withdraw its "30-minute delivery" policy under the threat of liability for auto accidents caused by franchisee-employed drivers.[87] The withdrawal comes in the wake of *Kinder v. Domino's Pizza, Inc.* in which a jury awarded not only $750,000 in actual damages but also $78 million in punitive damages to a woman struck when a pizza delivery van ran a red light.[88] Thus, the Franchisor's policy gave rise to liability to the woman injured as a result of the policy's implementation.

VI. Franchisor Liability Under Federal Remedial Legislation Other than the ADA

Federal courts recognize the ADA as remedial legislation.[89] Therefore, in order to shed light on the appropriateness of holding franchisors liable for Title III modifications, this section will examine whether liability extends to franchisors under other federal remedial legislation.

Title VII of the Civil Rights Act of 1964, a remedial statute, prohibits discrimination by an employer on the basis of race, color, religion or national origin.[90] Remedial legislation, passed to cure a perceived social ill, is to be interpreted liberally in accordance

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McGuire, 435 S.E.2d at 53; Myszkowski v. Penn Stroud Hotel, Inc., 634 A.2d 622, 629 (Pa. Super. Ct. 1993); Little v. Howard Johnson Co., 455 N.W.2d 390, 394 (Mich. Ct. App. 1990); Schear v. Motel Management Corp., 487 A.2d 1240, 1249 (Md. Ct. Spec. App. 1985).

84. *See* Whitco Produce Co. v. Bonanza International, Inc., 267 S.E.2d 627, 628 (Ga. Ct. App. 1980) (stating in dicta that liability for franchisee's debts may be imposed on the franchisor, if the franchisor "by some act or conduct obligated itself.").

85. *See* Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795, 798 (8th Cir. 1993).

86. *Id.*

87. *Kaufmann, supra* note 36.

88. No reported decision. The facts were obtained from Kaufmann, *supra* note 36.

89. Kinney v. Yerusalim, 9 F.3d 1067, 1073 (3d Cir. 1993), *cert. denied sub nom.* Hoskins v. Kinney, 114 S. Ct. 1545 (1994).

90. 42 U.S.C. §§ 2000e-2000e-17 (1988).

with and in order to accomplish its purpose.[91] Thus, it is appropriate to look to policy considerations to supplement legislation that fails to offer clear guidance.[92] However, words are to be given their ordinary meaning[93] and judicial construction is not to be used to revise a statute.[94] Despite the remedial nature of Title VII, plaintiffs have had a difficult time convincing courts to accept franchisors as employers for Title VII liability.[95] In interpreting franchisor liability for Title VII violations courts borrow the control test from the common law of agency known as an "economic realities" test.[96] The economic realities test focuses, on a case-by-case basis, on the entity to whom employees render service and on whom employees are dependent for income.[97]

The lack of Title VII liability supports the conclusion that the remedial nature of the ADA alone is insufficient to sweep franchisors into the group of liable parties. However, such lack of liability under Title VII does not establish that franchisors are not liable under the ADA, nor that the economic realities test is an appropriate one since the Civil Rights Act of 1964 bases liability on status as an employer,[98] whereas the ADA bases liability on status as an operator.[99]

Plaintiffs have also had difficulty in holding franchisors liable under the Fair Labor Standards Act (FLSA).[100] In 1978, a 15-year-old girl sued Yankee Doodle House, Inc., the franchisor,

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91. Monell v. Department of Social Services of City of N.Y., 436 U.S. 658, 684 (1978); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

92. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

93. Richards v. United States, 369 U.S. 1, 9 (1962).

94. Wheeler v. Main Hurdman, 825 F.2d 257, 262 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987).

95. *See* Evans v. McDonald's Corp., 936 F.2d 1087 (10th Cir. 1991); *Wheeler*, 825 F.2d 257; Kennedy v. McDonald's Corp., 610 F. Supp. 203 (S.D. W. Va. 1985). *But see* Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993).

96. For decisions supporting the use of the control and "economic realities" tests in determining franchisors' Title VII liability and finding franchisor control failed to reach the employer level, see *Evans*, 936 F.2d at 1087; *Wheeler*, 825 F.2d 257; *Kennedy*, 610 F. Supp. at 203. *But see Bradley*, 7 F.3d at 795 (Title VII action can be sustained against a franchisor on the basis of a franchisor's operating policy). For a brief history of the "economic realities" test, see *Wheeler*, 825 F.2d at 268 n.24.

97. *Kennedy*, 610 F. Supp. at 205.

98. The *Neff* court specifically held that cases under the Civil Rights Act are "unlikely to be informative on the meaning of [operates]" for purposes of the ADA, because the Civil Rights Act does not use that term to define liability. Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1070 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

99. 42 U.S.C. § 12182(a).

100. 29 U.S.C. §§ 201-219 (1988).

under the FLSA for injuries suffered while operating a slicing machine.[101] Although the franchise agreement required that the franchisee comply with federal law, and the franchisor was aware of the franchisee's noncompliance, the court held that the franchisor's right to terminate the franchise agreement was insufficient to establish liability under either an agency or independent contractor theory.[102]

In *Marshall v. Shan-An-Dan, Inc.*[103] the Secretary of the United States Department of Labor attempted to hold a franchisor, Precision Transmission, Inc., accountable under the FLSA for back wages owed to franchisee employees.[104] The court examined the control exerted by the franchisor over the franchisee and determined that the limits placed on the franchisee were insufficient to make the two a single entity under the FLSA.[105] However, the court noted specific provisions in the FLSA that eschewed the liability of franchisors.[106] These provisions are absent from the ADA.[107] Moreover, the FLSA, like Title VII, places liability on employers, rather than operators.[108]

One plaintiff brought suit against a franchisor under the Rehabilitation Act of 1973.[109] In 1980, a suit was filed against Budget Rent-A-Car Corporation, the franchisor, for a franchisee's

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101. Coty v. U.S. Slicing Mach. Co., Inc., 373 N.E.2d 1371 (Ill. App. Ct. 1978). The FLSA and regulations under the FLSA restrict operation of dangerous machinery to individuals over 18 years old. *Id.* at 1374 (citing 29 U.S.C. § 201ff; 29 C.F.R., Part 1500, Subpart E).

102. *Coty*, 373 N.E.2d at 1376.

103. 747 F.2d 1084 (6th Cir. 1984).

104. *Id.*

105. *Id.* at 1088.

106. According to the court, "a retail or services establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes [provisions of typical franchise agreements]." *Id.* at 1087 (citing 29 U.S.C. § 203(r) (1976)). The court also noted the legislative history of the FLSA which stated in part, "[t]he definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership *shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement. . . .*" *Id.* at 1088 (citing S. Rep. No. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1660-62) (emphasis added by the court).

107. 42 U.S.C. §§ 12101-12213.

108. 29 U.S.C. §§ 201-219.

109. 29 U.S.C. § 794. The target group under the Rehabilitation Act of 1973, those receiving federal funds, makes the Rehabilitation Act little help in defining the ADA's target group, "operators," but is useful in examining franchisor liability generally.

failure to lease a car to a handicapped individual.[110] The plaintiff, Timothy Cook, based his claim on the fact that the franchisor leased cars to the federal government.[111] The claim failed because the court held that lease payments were not a receipt of federal funds as contemplated by the Rehabilitation Act.[112] However, the opinion completely ignores all arguments against franchisor liability based on the franchisor's contractual status as an independent entity.[113] The opinion would seem to support the possibility of ADA liability for franchisors, especially since the case law surrounding the Rehabilitation Act has been endorsed as applicable to interpretation of Title II (Public Services) of the ADA.[114] Unfortunately, since the opinion does not address itself explicitly to the issue of franchisor liability, its precedential value in determining ADA liability is questionable.

The Black Lung Benefits Reform Act (BLBRA) provides for payments to be paid to miners suffering from black lung disease.[115] Unlike Title VII and the FLSA, liability under the BLBRA rests with any entity meeting the statutory definition of "operator": "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine. . . ."[116] In *Elliot Coal Mining Co. v. Director, Office of Workers' Compensation Programs*,[117] the court interpreted the foregoing definition. The court noted that the BLBRA was amended in 1978 and, according to the legislative history, the amendment was intended to prevent the use of corporate changes to escape liability.[118] The court went on to hold that a right of control, always present in a corporate structure, rather than exercised control, is the determinative factor in finding an entity to

110. Cook v. Budget Rent-A-Car Corp., 502 F. Supp. 494 (S.D.N.Y. 1980).

111. *Id.*

112. *Id.* at 502.

113. *Id.* at 494.

114. *See* Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir.), *cert. denied sub nom.* Pennsylvania Secretary of Pub. Welfare v. Idell S., 116 S. Ct. 64 (1995).

115. 30 U.S.C. §§ 901-962 (1986).

116. 30 U.S.C. § 802(d) (1986).

117. 17 F.3d 616 (3d Cir. 1994).

118. *Id.* at 631 (referring to the Black Lung Benefits Reform Act of 1977, 30 U.S.C. §§ 901-962 (1988)).

be an operator.[119] This decision would seem to support a holding of no liability for franchisors, like ADQ, that have no provision for architectural control written into their franchising agreements.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[120] like the BLBRA and the ADA, imposes liability for the cleanup of contaminated waste sites on, *inter alia*, "operators."[121] Unfortunately, like the ADA, CERCLA fails to define the term. Courts have dealt with numerous cases which attempt to pierce the corporate veil and hold parent corporations liable for the violations of subsidiaries.[122] Some decisions have held that the power to control, whether or not utilized, is sufficient.[123] These decisions would seem to support the holding in *Neff*.[124] Other decisions have steadfastly refused to find liability unless the parent corporation exercised day-to-day control over the subsidiary's business.[125] Actual, pervasive control of daily decisions is required.[126] Therefore, an unexercised ability to control is insufficient.[127] These decisions would seem to support the arguments of Ms. Neff and the DOJ for a factual inquiry into the amount of day-to-day control.

As an aside, the *Jacksonville Elec Auth. v. Eppinger & Russell Co.*[128] opinion mentions in a footnote that an exemption normally available to secured creditors may be waived if the creditor "participat[es] in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[129] One could make the argument that the impact of franchisors' operational controls and receipt of profits influences a franchisee's willingness and ability to undertake

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119. *Id.* at 638. Here the court found that the right of control was insufficient in leases where the lessor retained only a right of reentry and a right to royalty payments.

120. 42 U.S.C. §§ 9601-9660a (Supp. V 1993).

121. 42 U.S.C. § 9607(a)(1) (Supp. V 1993).

122. *See, e.g.*, Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993); Jacksonville Elec. Auth. v. Eppinger & Russell Co., 776 F. Supp. 1542 (M.D. Fla. 1991), *aff'd*, 996 F.2d 1107 (11th Cir. 1993).

123. *See, e.g.*, United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D. R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

124. Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

125. *Id.* at 1547.

126. *Id.*

127. *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221.

128. 776 F. Supp. 1542 (M.D. Fla. 1991), *aff'd* 996 F.2d 1107 (11th Cir. 1993).

129. *Id.* at 1547 n.5.

modifications to comply with the ADA. If the franchisee did not have to use some of its assets to make franchise payments to the franchisor and to comply with the franchisor's operating instructions, those assets would be available in the analysis of readily achievable modifications. Of course, a release of such obligations could also result in an undermining of the franchise relationship.

Although the Black Lung Benefits Act and the Comprehensive Environmental Response, Compensation and Liability Act target "operators" for liability, the subject matter of such legislation makes the application of their jurisprudence to ADA interpretation as questionable as the application of the other remedial jurisprudence surveyed. Nevertheless, an important theme emerges from the survey: liability is imposed on those individuals who have control, sometimes the right to control, sometimes actual control. This theme is the same as the common law of agency surveyed in section V of this Comment. With such widespread support, application of the concept of control to ADA liability is a small step. However, of the three cases that appear in the following section, which concern the ADA Title III liability of franchisors, only one has used a form of the control test.

VII. Survey of Other Franchisor Liability Cases Under Title III

In *Staron v. McDonald's Corp.*[130] a group of three asthmatic children and a lupus sufferer sued two restaurant franchisors, McDonald's Corporation and Burger King Corporation. The plaintiffs demanded that the franchisors prohibit smoking in all their restaurants (franchised and company-owned) as a reasonable modification under Title III.[131] The trial court granted the franchisors' motion to dismiss.[132] On appeal, however, the ruling was reversed and remanded.[133] Further, the appellate court refused McDonald's motion to dismiss the appeal as moot even after it had announced a smoking ban in all of its company-owned restaurants.[134]

130. 872 F. Supp. 1092 (D. Conn. 1994).
131. *Id.* at 1093.
132. *Id.* at 1094.
133. Staron v. McDonald's Corp., 51 F.3d 353 (2d Cir. 1995).
134. *Id.* at 355.

At first blush the result would appear to be in conflict with the result in *Neff*.[135] However, the appellate decision dealt only with the issue of whether a ban on smoking was a reasonable modification.[136] The franchisor did not challenge its status as owner and operator.[137] McDonald's is currently challenging on remand the court's ruling on its status as owner and operator.[138] Although McDonald's owns and leases the premises of McDonald's restaurants to its franchisees, McDonald's maintains that the smoking ban is a policy question and that ownership of the buildings does not establish control, and hence, liability for policy.[139]

The issue of control did prove determinative in *Aikins v. St. Helena Hospital*.[140] The hearing impaired wife of a hospital patient sued both the hospital and her husband's emergency room physician for a violation of the ADA when she was unable to communicate with the doctor and hospital staff.[141] The court held that the doctor was not liable under the ADA because he was an independent contractor and had no power to control the hospital's provision for interpreters.[142]

The case of *Pinnock v. International House of Pancakes Franchisee*[143] is not a case about franchisor liability at all. Rather, it deals with a franchisee's challenge to the ADA as unconstitutionally beyond the scope of Congressional authority.[144] Of course, Congress' authority to legislate even for single restaurants, based upon their collective impact on interstate commerce, is settled law.[145] What is disruptive about the court's opinion, however, is that it uses the franchisee's connection to the franchise network and cites the volume of the *franchisor's* business to

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135. Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

136. *Id.*

137. *Id.*

138. Telephone Interview with Robert Farr, *supra* note 29.

139. *Id.*

140. 843 F. Supp. 1329 (N.D. Cal. 1994). Plaintiff was joined in this action by the California Association of the Deaf. *Id.*

141. *Id.* at 1332.

142. *Id.* at 1335. Plaintiff's additional claims against the doctor and the hospital are beyond the focus of this Comment.

143. 844 F. Supp. 574 (S.D. Cal. 1993).

144. *Id.*

145. *See* Katzenbach v. McClung, 379 U.S. 294 (1964). Congressional authority to regulate commerce rests on U.S. CONST. art. I, § 8.

support the franchisee's role in interstate commerce.[146] The court thus implicitly ties the franchisors and franchisees together without any consideration of the control exercised in the franchise relationship.

VIII. Analysis of the Equities in the *Neff* Decision

The *Neff* decision is not incompatible with decisions surveyed in the common law and in other areas of remedial legislation. The Fifth Circuit focused on the issue of control to determine whether the franchisor was an operator.[147] The approach seems eminently reasonable. However, the test the court ultimately developed was whether the franchisor had control over the architectural design of the franchisee's business. The test would read the statute as prohibiting discrimination by anyone who owns, leases (or leases to), or has control over the architectural design of a public accommodation. Viewed in this light, the test is considerably less reasonable. If Congress had intended so narrow a focus of liability it could have chosen this language, or many other more restrictive substitutes than the broad term "operates."

Moreover, one could argue that franchisors "operate" a network of franchisees. The franchisors and the franchisees certainly have a community of interest; where the franchisee is successful, so is the franchisor. It is not unreasonable, therefore, to speculate that Congress was trying to reach this community of interest.

IX. Title III Liability after *Neff* and a Suggestion for the Equitable Settlement of Franchisor Liability

The ability to hold the franchisor liable for Title III compliance on architectural access is important for three major reasons. Unlike the other remedial statutes discussed above, Title III contains the provision that modifications need not be made if they are too difficult or unreasonably expensive.[148] Expense is determined by the financial resources of the covered entity.[149] If franchisors are not held liable, franchisee assets may be low

146. *Pinnock*, 844 F. Supp. at 579.

147. Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

148. 42 U.S.C. § 12181(9).

149. *Id.*

enough, particularly in early years of operation, to escape having to make the modifications at all. Since the franchise industry occupies a dominant role in precisely the areas of public accommodation that Title III was intended to cover,[150] widespread exercise of the readily achievable "out clause" could severely frustrate Congress' purpose in adopting the ADA. Moreover, a holding affirming franchisor liability would increase the incentive of a franchisor to negotiate for franchisee compliance. Franchisor liability would also encourage franchisors to use greater care in their selection of franchisees.[151] Without franchisor pressure[152] and with the protection of the "readily achievable" limitation available, franchisees may well delay until suit or the threat of suit forces compliance upon them.[153]

The second reason that franchisor liability is important is that, without it, persons with disabilities will have to attack noncompliance on a store-by-store basis. ADQ franchises 798 restaurants in Texas alone.[154] Suing even a fraction of those restaurants for noncompliance presents a daunting task for even the most litigious plaintiff. One could argue that, if these businesses were not franchised, persons with disabilities would have no other option than to sue them one-by-one. However, it may be that in choosing to take advantage of nationwide recognition and to present themselves to the public as related entities, franchisors and franchisees have voluntarily accepted a responsibility toward that

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150. Under 42 U.S.C. § 12181(7), "public accommodations" are defined in twelve categories and include, briefly: privately owned hotels, restaurants, movie theaters, retail sales stores, schools and, generally, any places providing consumer goods and services. Among the business categories in which business format franchises concentrate are restaurants, hotels, business services, automotive services, automotive rental services, convenience stores, construction and home improvement, recreation and educational services, and cleaning services. INTERNATIONAL FRANCHISE ASSOCIATION, FRANCHISE FACT SHEET (1995).

151. *See* Greil v. Travelodge International Inc., 541 N.E.2d 1288 (Ill. App. Ct. 1989) (holding the franchisor liable for a guest's injuries suffered during robbery of a motel franchise).

152. Any antitrust implications of franchisor pressure on franchisees to comply with the ADA are beyond the scope of this Comment.

153. Once a complaint is filed, plaintiffs with disabilities generally have greater leverage to reach an acceptable settlement with a franchisee than with a franchisor. To the franchisor it may be just another lawsuit which has been brought against it. Telephone Interview with Robert Farr, *supra* note 29.

154. Laws, *supra* note 9.

same public.[155] The public may have a right to expect that businesses operating under household names like Dairy Queen, Burger King or McDonald's will comply not only with the letter of the law, but also with the spirit behind the social policy established by the law.[156] It may be that franchisors and franchisees cannot have it both ways; that is, they cannot be independent of one another for liability purposes, but linked for purposes of profit.[157] The franchise in its present form may not be entirely compatible with public policy. Indeed, the common law may be recognizing that possibility in decisions like *Holiday Inns, Inc. v. Shelburne*[158] and *O'Boyle v. Avis Rent-A-Car System, Inc.*[159] The inequity may have been in allowing the franchise system to exist as something of a legal fiction for fifty years.

The third reason for the importance of being able to hold the franchisor under Title III is that, if *Neff* remains law, legal practitioners can draft franchise agreements that can provide for franchisor control over every operational aspect of a franchisee's business, but may specifically and intentionally omit any control over those aspects giving rise to ADA liability. The *Neff* rule is open to abuse and appears to let private contract law dictate the reach of federal legislation. An omission is effective to avoid liability where an allocation of liability would not be. For these three reasons, it appears that the rule set forth in the *Neff* case was not fair and, in view of the purpose of the ADA, not desirable.

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155. *See* Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322 (Fla. Dist. Ct. App.), *cause dismissed*, 589 So. 2d 291 (Fla. 1991), *overruled on other grounds by* Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995).

156. In Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 387 (5th Cir. 1977), the court noted, "[c]ustomers rely upon the [trademark] owner's reputation when they select the trademarked goods." Provision of accessible accommodations to people with disabilities should be considered when assessing the goodwill associated with a mark.

157. In 1991, the European Economic Community proposed a directive (the EEC's equivalent of legislation) that would have provided for strict liability for the provision of services. Malcolm Dewis, *A Recent Directive Will Establish the Concept of Strict Liability for the Provision of Services*, POST MAG., June 6, 1991. While the directive focused on liability for personal injuries and damages to property, *id.*, it was perceived as a source of franchisor liability for franchisees, *IFA Opposes EC Liability Reg*, 3 FRANCHISE LEGAL DIG. 5 (1991). The directive was opposed by European franchise organizations as well as by the IFA. *Id.* The proposal for the directive was withdrawn in 1994, *Commission Withdraws Proposal on Liability of Services*, THE REUTER EUROPEAN COMMUNITY REP., July 8, 1994, because opposition would have robbed the directive of its substance prior to passage, *id.*

158. 576 So. 2d 322 (1991).

159. 435 N.Y.S.2d 296 (N.Y. App. Div. 1981).

Despite the foregoing, certain equitable factors support the contention that franchisors should not be liable under Title III, or at least not liable at a level equal to that of franchisees. In the last decade a type of consumer protection law has developed that is intended to protect franchisees from unfair business practices of franchisors.[160] Such laws buttress the argument that the independent character of franchisors and franchisees is fact, not fiction, and makes it more difficult to view them as a collective entity. There is also, admittedly, a certain unfairness in springing liability on franchisors after they have negotiated their contracts, particularly if they have no contractual power to enforce ADA compliance on their franchisees.[161]

One solution to the dilemma could be to hold franchisors liable to the point of their interest in the franchised business, but not absolutely liable for Title III compliance. If the franchisor is found to have the necessary control over operation of the business, the franchisor's royalty payments, rather than its net worth, could be included in the determination whether a proposed modification is readily achievable. This proposal has advantages over the Fifth Circuit approach in that it limits the franchisor's exposure while providing both franchisors and franchisees with compliance incentives, recognizes the reality of the community of interest in the

160. For discussions of state laws regulating franchisors' relations with franchises, see Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating a Franchise Agreement*, 28 VAL. U. L. REV. 785 (1994); Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905 (1994); Erwin S. Barbre, Annotation, *Validity, Construction, and Effect of State Franchising Statute*, 67 A.L.R.3d 1299 (1975); Erwin S. Barbre, Annotation, *Fraud in Connection with Franchise or Distributorship Relationship*, 64 A.L.R.3d 6 (1975).

161. However, the lease agreements between landlords and tenants also allocate control over the architectural design of leased structures. Regardless of this allocation, both landlords and tenants are liable under Title III of the ADA. 42 U.S.C. § 12182(a). Although Department of Justice (DOJ) regulations recognize the allocation of responsibility for ADA compliance between a landlord and tenant, 28 C.F.R. 36.201(b) (1994), the DOJ's *The Americans with Disabilities Act Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* explains that allocation is effective only between the landlord and tenant, not in relation to third parties. DEP'T OF JUSTICE, *supra* note 20.

franchise relationship,[162] and facilitates creation of the barrier-free environment that the ADA promised to persons with disabilities.

Unfortunately, this approach has no judicial precedent in other remedial legislation and no basis in the language or legislative history of the ADA. Imposition of this limited liability approach would represent profound tinkering by the judiciary with Congressional legislation. It is, therefore, unlikely to be adopted.

X. Conclusion

The ADA's provisions do not solve the question of franchisor liability for Title III. If Congress does not amend the ADA[163] and *Neff* becomes the guiding precedent of future Title III cases, persons with disabilities will need to wait even longer for the equality of access their representatives promised them when the ADA was passed. Persons with disabilities can still obtain their rightful access; they just have to sue each individual store or wait until each decide to remodel.[164] The irony is that by refusing to

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162. Corporations have yet to complain or recognize publicly that, while they are burdened with ADA compliance for businesses they operate directly, franchisors may be benefitting from a competitive advantage in not being liable under the Act. Of course, it can also be argued that compliance gives a franchise a competitive edge. The following story was related by Congressman Houghton of New York during the floor debate on the ADA:

> [A] restaurant in my district, because of New York law, was forced to install an elevator to take disabled patrons to one of the three floors of the restaurant. The proprietor resisted the mandate but finally complied. To his surprise, he found that his business increased because of his initiative. The move helped attract the disabled to his restaurant. In addition, word got out about the elevator and as a result it attracted seniors and non-disabled people who did not want to walk those stairs. Still another plus—the waiters [use the elevator] to take food to the upper level.

136 CONG. REC. H2445 (daily ed. May 17, 1990).

163. At present, there are no plans in Congress to amend the ADA. Congress intends to allow the courts to work out the application. Telephone Interview with Bobby Silverstein, minority counsel to the Senate Subcommittee on Disability Policy (Oct. 31, 1995).

164. The undue burden defense is not applicable to alterations or new construction. 28 C.F.R. § 35.151 (1994). If a store undertakes a remodelling, it must make accommodations for access for persons with disabilities as a part of the project. *See* Kinney v. Yerusalim, 9 F.3d 1067, 1071 (3d Cir. 1993), *cert. denied sub nom.* Hoskins v. Kinney, 114 S. Ct. 1545 (1994).

recognize any liability on the part of franchisors, the *Neff* court may have disabled the ADA.[165]

Kathleen Pearson

165. There is concern that the Fifth Circuit will be playing a disproportionate role in developing the jurisprudence surrounding the ADA because the number of cases arising in Texas is unparalleled in any other state. Janet Elliot, *Legal Aid Runs Out of Band-Aids*, TEX. LAW., Oct. 9, 1995 at 1. Thomas D'Agostino, managing editor of the National Disability Law Reporter, said of the case law in general, "[t]he trend is decidedly pro-employer, despite what you see in the media about stories about people with relatively trivial impairments using ADA to gain advantages, but in the case law so far the exact opposite is true—courts are routinely ruling in favor of employers." *Id.*